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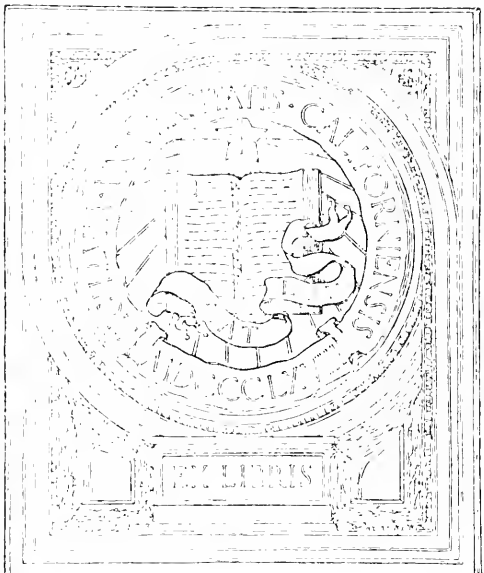

LEAGUE OF NATIONS

THE PERMANENT COURT OF INTERNATIONAL JUSTICE

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GENEVA,
September 10th, 1921.

All the work for the organisation of the world has revolved around two different poles, namely, community of interests and conflict of interests. This has tended, on the one hand, to the furtherance of common interests, and, on the other, to the prevention or avoidance of threatened conflicts when the interests of one country ran counter to those of another. The work in the former direction had its effect in the creation of a widespread network of administrative organisations covering all, or as many as possible, of the civilised countries. Such organisations included the Postal and Telegraph Unions, the Agricultural Institute at Rome, International Railway Conventions, the network of treaties concerning patents, copyrights, and trade marks. The work for the avoidance of war crystallised in international agreements for judicial settlement of international disputes, or for impartial investigation and attempts at conciliation. The synthesis of these efforts was constituted by the Conventions for the pacific settlement of international disputes, which were concluded at what are known as the two Peace Conferences held at The Hague in 1899 and 1907.

When the war came, it involved among others the two big Anglo-Saxon nations who maintain the legal doctrine that war dissolves international agreements between belligerents; thus, the development of the organisation of the world along administrative lines was interrupted, although the peace treaties tended to bind together the threads uniting the Past with the Future—threads torn asunder by the war; the war itself, especially in view of the events which surrounded its origin, was a challenge to the methods for the avoidance of war which had hitherto been practised, and a denial of the agreements which, in this respect, had been concluded.

If, in these circumstances, the efforts of the nations of the world were once more to be united and directed towards a common end, instead of being turned towards conflict of national interests, endeavours would have to be made on fresh lines.

THE FUNDAMENTAL IDEAS OF THE LEAGUE OF NATIONS.

Such lines were found in the conception of a League of Nations or States. In this conception there were welded together the ideas of a world organisation for the furtherance of common interests and for the avoidance of conflicts. This was possible because, at the bottom of both was the idea of the interdependence of States. This interdependence, of course, grows as long as peaceful conditions prevail, and the maintenance of Peace is made easier by the existence of interdependence, since interdependence makes Peace a predominant interest to any State: further, interdependence makes it possible to create an efficient system of sanctions for violations of international obligations concerning the maintenance of Peace, a system, however, that can only be applied by an organisation of States that is practically universal, and thus able to control the working of the interdependence. This organisation is the League of Nations, and the sanctions are its economic weapon.

[1] This explanatory statement is, in substance, a reproduction of a paper prepared by M. Hammarskjöld, member of the Permanent Secretariat, on the occasion of the visit to Geneva of members of the British League of Nations Union.

The League, with a view to carrying out its task of continuing and perfecting the world organisation in its two aspects, first of all imposes on her Members, and to a certain extent also on States which are not Members of the League, an obligation which, broadly speaking, consists of an engagement not to resort to war until a pacific settlement of the pending dispute has been tried. Obviously, the League must, in these circumstances, create machinery for such settlement, and the Covenant does not fail to provide such machinery.

In doing so, it gives the Members a choice between conciliation and judicial settlement. The conciliation takes place before the Council of the Assembly of the League. The judicial settlement is confided to various kinds of tribunals, such as arbitral courts agreed upon by the parties in a particular case, arbitral courts according to the Hague Conventions, and the Permanent Court of International Justice.

The Covenant speaks only of "arbitration." Does this mean arbitration in the narrow and technical sense of the word, or a judicial settlement in a more general way? On the answer to this question depended the whole character of the Permanent Court of International Justice. If the former solution were adopted, the Permanent Court would be nothing but a special kind of Court of Arbitration. If, on the contrary, the second solution were preferred, the Permanent Court might be something else and something more.

The only stipulation about the Court contained in the Covenant is Article 14, which runs as follows:—

> "The Executive Council shall formulate plans for the establishment of a Permanent Court of International Justice and this Court shall, when established, be competent to hear and determine any matter which the parties recognise as suitable for submission to it for arbitration under foregoing articles."

The Precedents Created by The Hague Conference.

This Article must be viewed against the background of earlier developments. These are precedents of the greatest importance. The organisation of international justice was the main object of the Peace Conferences held at the Hague in 1899 and 1907; the Conferences succeeded in organising international arbitration which, for half a century, played so important a part in the solution of international conflicts. They produced a Convention for the pacific settlement of international disputes by creating the Permanent Court of Arbitration at The Hague. This Court consists of a Permanent Bureau and a Council of Administration with headquarters at The Hague, of a panel of judges from among whom the tribunals called upon to decide a specific case may be selected, and a body of rules of procedure to be used failing an agreement between the parties establishing other rules. The choice of the acting judges must be made in each special case by the parties, and the parties must agree on the material law to be applied by the tribunal. This Court is certainly not a Court in the sense generally given to the word, but if it were to fulfil the task for which it was designed it could not be otherwise. The leading principle of arbitration, indeed, is to afford the parties complete liberty to have recourse to judges of their own choice. To give up this principle would be to give up arbitration itself.

As early as at the Conference of 1907 it was felt that arbitration generally, and, in particular, the institution which had just been created, were not entirely satisfactory for all purposes. The Court of Arbitration was not really permanent. The agreement of the parties was required in order to make it competent. The parties were represented on the tribunal by members of their own nationality, and even the material law depended on the wishes of

the States concerned. What was needed was a Court, always available, consisting of a limited number of judges, holding regular sessions, basing its discussions upon rules laid down, not by the parties, but by general international law or by treaties, or, more generally, deciding according to principles of law — briefly, a Court that would be entirely independent of the parties, that might be able vigorously to contribute to the formation and development of international law by its independent judgments, and that would constitute a real jurisprudence.

The Failure to create a Court of Arbitral Justice.

For these reasons, the Conference made efforts to create a Permanent Court of Arbitral Justice. However, the Conference did not succeed in creating that Court. A complete agreement on the basic principles of the new institution, and also on the solution of most of the problems involved in their realisation, was arrived at without difficulty; but no agreement could be reached on the number of the judges or on the method of electing or appointing them. The principle of the equality of all sovereign States was in opposition to the desire of the Great Powers always to be represented on the Court, and the Conference, giving up the attempt at organising the Court, after having approved it in principle, limited itself to inserting in the Final Act the following Resolution: —

> " The Conference recommends to the Signatory Powers the adoption of the annexed draft convention for the creation of a Court of Arbitral Justice and putting it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the Court. "

Article 14 of the Covenant.

Article 14 of the Covenant imposed on the League of Nations the task of carrying out this recommendation and thus accomplishing the work which proved to be beyond the powers of the Diplomatic Conference which sat at The Hague in 1907.

Conditions for the creation of a Permanent Court of International Justice were far more favourable in 1920 than in 1907. In the admirable utterance of M. Léon Bourgeois, Rapporteur on the question at the second, and later at the eighth, ninth, tenth and eleventh sessions of the Council:—

> " From all parts of the devastated and tormented world rises a cry for justice. The military and moral unity which for five years has held the free peoples together, and concentrated their efforts in the defence of the right, must survive with our victory; it can find no nobler expression nor a more splendid symbol than the establishment of a Permanent Court of International Justice. This Instrument of the League of Nations, this Court, however composed, will be free from all particular preoccupations in the exercise of its sovereign jurisdiction; and the intervention of the Council, or even of the Assembly, in the choice of its Members will be calculated to remove all anxieties and guarantee against all attack the guardian principle of the equality of nations. "

It should be noted that Article 14 of the Covenant, providing for the establishment of the Permanent Court of International Justice was in its present form inserted in the Covenant only after February 14th and by reason, it seems, of objections raised by certain neutral countries against the draft published on that date. The text of this draft was as follows:—

"The Executive Council shall formulate plans for the establishment of a permanent court of international justice, and this court shall, when established, be competent to hear and determine any matter which the parties recognise as suitable for submission to it for arbitration under the foregoing Article."

It should further be noted that during the discussions at the Peace Conference on the terms of the future Covenant it was eventually recognised that the Permanent Court of Arbitration, created by the 1899 and 1907 Conferences, should not be abrogated.

All the facts above referred to give some general indications as to how the expression "Arbitration" in the Covenant should be understood, and as to the character, subsequently, of the Permanent Court, according to the intentions of the framers of the Covenant. "Arbitration" meant judicial settlement, and the new Court should be fundamentally a judicial and not an arbitral institution, since it would otherwise be little more than a duplicate of The Hague Court of Arbitration, for the continuance of which the Peace Conference had pronounced. It should further be a really permanent institution, that is to say, a strictly limited body of judges available for settling disputes at any moment, and always constituted, so that the parties would not have to make a special agreement concerning its composition in each particular case. The Court should have its fixed rules of procedure, and fixed principles or texts of international law to serve as a basis for its judgments.

But, from the facts referred to, no conclusions could be drawn to the effect that the new Court could not be used for purposes of arbitration in the technical sense, defined a moment ago, should the parties so desire, and it could not be inferred that the Court should be competent to hear and determine disputes referred to it by one of the litigants only. It should not be forgotten that, according to the Covenant, the Court should be competent to hear and determine only disputes *which parties thereto submitted to it.* And although the Peace Treaties contain many special stipulations making the jurisdiction of the Court compulsory in special cases, although it was to be foreseen that the number of similar stipulations would increase, although it was even conceivable that the Council of the League might, by a unanimous decision, refer litigants to the decision of the Court, it remained nevertheless true that, in the terms of Article 13 of the Covenant, States need have recourse to the Court, generally speaking, only when it pleases them. On the other hand, it was perhaps equally true that the necessary agreement between the litigants to refer a dispute to the Court could be made not only in the special case but also in a general way—in a general convention—and that nothing seemed to prevent such convention from being the same as that which established the Court.

Be that as it may, there were many reasons for assuming the view to be correct that, according to the intentions of the framers of the Covenant, the Permanent Court of International Justice should be a Court of Justice and not a Court of Arbitration, but that it should be able to act as arbitrator at the request of the parties; that it should be always accessible; that the judges should be appointed only on account of personal merit and without regard to their nationality and, finally, that the Court should judge according to law.

It is a curious fact that the question of the exact legal character of the new Court of International Justice was never settled in an authoritative way by those who framed the Covenant. It seems, however, that the opinion just expressed could be described as the idea at the back of the mind of everybody who had studied the Covenant thoroughly and acquired some knowledge of existing precedents in the field of international jurisdiction. This opinion was, therefore, more or less, the starting point for the work of preparing plans for the new Court which the Covenant had entrusted to the Council.

The Summoning of an International Committee of Jurists.

The Council, at its second Session, in February, 1920, began to make preparations for carrying out this work. It appointed a Committee of Jurists from different countries and asked this Committee to present to the Council a draft project for the organisation of the new Court. This took place in the following way:

The Secretary-General of the League of Nations submitted to the second Session of the Council a list, which he had prepared on the initiative of the organising committee of the League, and which contained the names of international jurists who might be invited to form a Committee, to prepare plans for the establishment of a Permanent Court of International Justice. The Secretary-General obtained the authorisation of the Council to send letters of invitation to the persons mentioned in the list, and also to form a small expert secretariat to prepare material for the Committee.

The Committee was eventually convoked at the Peace Palace at The Hague on June 16th. The composition of the Committee as originally proposed underwent very serious modifications and when it started its work it comprised the following members:

M. Adatci	Japan.
M. Altamira	Spain.
Baron Descamps	Belgium.
M. Fernandes	Brazil.
M. Hagerup	Norway.
M. de Lapradelle	France.
M. Loder	Netherlands.
Lord Phillimore	Great Britain.
M. Ricci-Busatti	Italy.
Mr. Root	United States.

For various reasons, the idea of constituting an expert secretariat had been abandoned, but the secretariat of the Committee was placed under the direction of Commendatore Anzilotti, Under Secretary-General of the League.

The decision to meet at the Peace Palace had been taken by the Members of the Committee, who availed themselves of an invitation addressed to them by the Government of the Netherlands.

M. Léon Bourgeois, specially designated to act on behalf of the Council of the League, in his openingspeech described the part which the Permanent Court of International Justice would fill in the orbit of the League.

From June 16th to July 24th the Committee held thirty-five official meetings, the first and last of which were public.

The result of its work was a draft scheme for the establishment of a Permanent Court of International Justice, a report to the Council concerning the scheme, and three recommendations *(vœux)*.

It is a well-known fact that this scheme was drawn up on the basis of the draft submitted by Mr. Root and Lord Phillimore; on the most delicate point at issue it embodied ideas which had been put forward by the former from the very outset of the work of the Committee.

The first of the recommendations referred to the convocation of periodical Conferences for the Advancement of International Law; the second had regard to the establishment of

a High Court of International Justice, with criminal competence, intended to judge crimes against international public order, and the universal law of nations; the third, and last, recommendation dealt with the putting into operation of the Academy of International Law, founded at The Hague in 1913.

The Draft Scheme of the Hague Committee.

The main features of the draft scheme prepared by the Committee were: The Court should consist of eleven to fifteen judges and four to six deputy-judges. They were to be elected by the concurrent vote of the Council and the Assembly of the League from a list composed as follows: Each group of members, appointed by one and the same State, of the Permanent Court of Arbitration, should, after hearing the most competent bodies and authorities of that country, propose two candidates for election. These candidates were to be chosen regardless of nationality, and should form a general list from which the elections should be made. The scheme provided for means of avoiding possible deadlocks, and in particular for a joint Conference of Members of the Council and of the Assembly.

The Court was to have its seat at the Hague, where the President and the Registrar of the Court were always to reside. It should have its ordinary sessions during the summer months. Extraordinary meetings were provided for, and, when the Court was not sitting, a delegation or chamber should always be available for deciding matters by summary procedure. In any case, judges of the nationality of the parties should retain their seats, and, failing such judges, parties would have the right to appoint national judges for the time being. The position of a judge should be incompatible with the holding of a post connected with the political direction of any State. Moreover, a certain number of cases were foreseen in which judges would have to give up their places for special reasons. The judges were to receive an annual salary, and the President was, in addition, to receive a special grant.

The Competence of the Court according to the Hague Scheme.

The Court should have jurisdiction only concerning suits between States. It should always have jurisdiction when there existed an agreement between the parties, but should also take cognisance, on the initiative of one party or another, in suits concerning " questions of a juridical nature. " This conception was defined in the scheme. One point of the definition was " any question of international law. "

The right to jurisdiction by unilateral arraignment was subject to certain restrictions, the most important of which were that diplomatic means for the settlement of the dispute should first have been exhausted, and that the dispute should be one between States members of the League of Nations.

The Court should, of course, give advisory opinions in accordance with the latter part of Article 14 of the Covenant.

The Procedure of the Court according to the Hague Scheme.

This procedure was based on that adopted by The Hague Conferences in the Arbitration Convention, in the Prize Court Convention, and in the Draft Convention for the establishment of a Court of Arbitral Justice.

The following features deserve mention:—

The language of the Court was to be exclusively French — that is to say, all judgments were to be delivered in French.

During a process the Court should have the right to suggest to the Council measures calculated to preserve the rights of the parties in cases where they might seem jeopardised.

Under certain very strict guarantees, the Court should have the right to deliver judgment by default.

Dissenting opinions might be stated in the judgment, but without reasons therefor.

The right of obtaining revision was subject to the provision that the ignorance of a relevant fact on which the case for revision was built might not be ascribed to lack of diligence on the part of the party demanding revision.

The Draft Scheme before the Council.

By a special resolution, the Committee finally decided to entrust to its secretariat the submission of the results of its work to the Council of the League at its meeting at San Sebastian. The Committee decided not to advocate or argue its conclusions in any way.

At San Sebastian the Council, on the report of M. Bourgeois, and after hearing the Rapporteur of the Committee, decided that the draft scheme prepared by the Committee and also its report (including the recommendations), should be communicated to the Governments of the Members of the League of Nations for their information, and that M. Bourgeois, while keeping in touch with the other members of the Council, should prepare a preliminary report on the Committee's draft, to serve as a basis for the final opinion of the Council. At the same time, the Council expressed to the Governments its hope that the Members of the League, when considering the draft scheme, would be animated by the same spirit of conciliation and of mutual concession which had obtained during its preparation.

At its meeting in Brussels in October last the Council had to decide on the plan for the establishment of a Permanent Court of International Justice which, according to Article 14 of the Covenant, it was to submit to the Members of the League for adoption. The Council took as its basis for discussion the Hague Scheme and the comments on it prepared by M. Bourgeois, as well as a certain number of observations communicated by the Italian, French and Belgian Governments. Further, the Swedish and Norwegian Governments had sent in amendments which were brought to the knowledge of the Council.

The general report to the Council on the question of the plan to be submitted by it to the Assembly was made by M. Bourgeois. M. Caclamanos, the Greek representative, was entrusted with the task of reporting upon the question of the official languages of the Court and also on the recommendations added by the Hague Committee to its draft scheme.

M. Bourgeois was of opinion that the Council should, in the main, adopt the Committee's scheme as its own, and submit it to the Assembly for approval. He thought, however, that the Committee's scheme, in providing for compulsory jurisdiction, went outside the Covenant of the League of Nations, and that it was not for the Council to propose to the first meeting of the Assembly amendments to the Covenant, or resolutions that would amount to such amendments. For this reason, he suggested that the scheme be modified in such a way as to bring it into entire conformity with the Covenant.

He also proposed modifications, which can be summarised as follows:—

The salary of the judges to be divided into two parts — one moderate annual indemnity, and a daily allowance for the actual time of function.

Divergent opinions might be published simultaneously with the majority finding, with a statement of reasons.

The judgment to be binding only upon the actual parties to a dispute and only concerning the dispute in which it is given.

The Council agreed to the proposals of M. Bourgeois and consequently decided to submit the scheme to the Assembly with the modification suggested by him, together with the further alterations which they necessitated.

M. Caclamanos proposed to substitute for the original provisions of the scheme concerning the languages of the Court an Article stipulating that these languages should be French and English; — that judgment should be delivered in which ever of the two languages was chosen by the parties; and that if the parties did not agree on the choice of a language, judgment should be rendered in the two languages, the Court deciding beforehand which text was to be considered as authoritative. By agreement between the parties and the Court, a third language could be adopted. The Council adhered to these suggestions, M. Bourgeois abstaining from voting.

Concerning the Resolutions of the Jurists Committee, M. Caclamanos proposed that the two resolutions concerning, respectively, the convocation of International Law Conferences and the establishment of a High Court of Justice, should be referred to the big Academies of International Law, in order to obtain their remarks and recommendations, and thereafter to the Governments; and that the League should eventually take action in the light of the answers obtained.. The third Resolution should, according to the recommendations of M. Caclamanos, be simply transmitted to the Assembly of the League and to the private organisations concerned.

M. Caclamanos proposed to add to the resolutions of the Jurists Committee a resolution by the Council expressing the wish that, if the projected Conference of International Law were convoked, it should be entrusted with the task of investigating the possibility of conferring on the Permanent Court of International Justice the right of compulsory jurisdiction. This recommendation was based upon the fact that the decision of the Council to take out from the Hague Scheme its provisions concerning compulsory jurisdiction was prompted not by hostility towards the principle of compulsory jurisdiction, but exclusively by the consideration that the Council felt bound to adhere strictly to the Covenant.

The recommendations of M. Caclamanos concerning the different resolutions (*vœux*) were agreed to by the Council.

The Revised Draft Scheme before the Assembly of the League.

The report which M. Bourgeois had submitted to the Brussels Council Meeting concluded with the following words:— " It will be the duty of the general Assembly to draw up the terms of the future international convention which is to be submitted for the signature of the Members of the League of Nations. " Accordingly, the Council submitted the scheme for a Permanent Court, which it had approved at Brussels, to the first meeting of the Assembly in November, 1920.

The Assembly immediately referred the question to a Committee (the third Committee), which was presided over by M. Bourgeois himself. This Committee for some days discussed the scheme in a general way, thus furnishing to the several delegations an opportunity of expressing their views, especially on the question of the jurisdiction of the Court — the burning question whether the Court should have compulsory jurisdiction or not. It became clear that a majority of the members wished that such jurisdiction should be given to the Court, whereas a certain number of members were strongly opposed to the idea of giving such wide powers to the new institution.

When this general discussion was finished the Committee appointed a Sub-Committee, which it entrusted with the task of examining in detail the scheme transmitted by the Council, and of reporting on it as soon as possible, at the same time proposing any amendments which in might find necessary. The Sub-Committee consisted of ten members, five of whom had sat on the Advisory Committee of Jurists which met at the Hague. It elected for its Chairman the late M. Hagerup, of Norway, who also acted as rapporteur.

After a few weeks of very hard work, the Sub-Committee reported to the Third Committee. In the main, it recommended the adoption of the scheme submitted by the Council. It suggested, however, a certain number of amendments, most of which were amendments of drafting, but some of which were of material importance. It should be mentioned that the Sub-Committee had to take into account a great number of amendments proposed by certain delegations and also suggestions communicated by the International Labour Office.

The material modifications of importance which were proposed by the Sub-Committee may be summarised as follows:— Arrangements should be made in order also to allow such Members of the League as were not represented on the Permanent Court of Arbitration to nominate candidates for the election of judges. Incompatibility of functions should be extended so as to cover also membership of Parliaments. When dealing with Labour and Transit questions, technical assessors should be joined to the Court, and special sections of the Court, including a limited number of judges, should be formed, which would be competent to hear and determine such questions, if so desired by the parties. The Court should have the power to transfer itself to other places than The Hague, where its seat was established. As regards competence, it should be expressly stated that when treaties mentioned "the jurisdiction to be established by the League of Nations," the Court would be such jurisdiction and, further, that the Court should be able to give judgments *ex aequo et bono*, should the parties so decide in a special case. The Court should, when giving advisory opinions, be composed in the same way as when rendering judgments.

The Third Committee approved the report of the Sub-Committee, and, in all essentials, adopted the revised draft which it had submitted. It, however, introduced a few modifications, the most important of which were the right for the Director of the Labour Office to receive all printed documents of procedure emanating from the Court; and, above all, a new system concerning the jurisdiction of the Court. According to this system, the Court would have jurisdiction only by virtue of an agreement between the parties or by virtue of special treaty stipulations. In the latter case only would unilateral arraignment take place. However, the possibility was opened to all those States which might participate in the creation of the Court to sign a clause according to which they might accept, on condition of reciprocity, the compulsory jurisdiction of the Court in disputes of a legal character.

The draft, as finally adopted by the Committee, was referred back to the Assembly and was there unanimously adopted on December 13th. The Resolution proclaiming the adoption stated that the Assembly declares its approval of the draft statute; that the statute shall, within the shortest possible time, be submitted by the Council to the Members of the League for adoption in the form of a Protocol, duly ratified, and that the Protocol shall remain open for signature also by the States mentioned in the Annex to the Covenant, that is to say, in the first place, by the United States of America.

At the request of the Council, the Committee continued its work on the recommendations submitted by the Council and on the question of the salaries to be given to the members of the Court, etc. This work resulted in two reports by M. Lafontaine, of Belgium. The Assembly approved the report concerning the salaries and adopted the scales contained in it, according to which the judges are to receive a fixed annual salary of 15,000 florins and a daily allowance during their periods of actual work. The President, who is to be domiciled at the Hague, will receive a yearly amount of 60,000 florins.

The Assembly altered the resolution proposed on the subject of the recommendations, all of which were rejected. This meant, among other things, that the League would not convoke any conferences for the codification of international law.

The Protocol of Signature mentioned in the Assembly resolution of December 13th was opened at the offices of the League on December 16th.

The Protocol establishing the Court.

It runs as follows:—

" The Members of the League of Nations, through the undersigned, duly authorised, declare their acceptance of the adjoined Statute of the Permanent Court of International Justice, which was approved by a unanimous vote of the Assembly of the League on December 13th, 1920, at Geneva.

" Consequently, they hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above mentioned Statute.

" The present Protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on December 13th, 1920, is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations: the latter shall take the necessary steps to notify such ratification to the other Signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations.

" The said Protocol shall remain open for signature by the Members of the League of Nations and by the States mentioned in the Annex to the Covenant of the League.

The Statute of the Court shall come into force as provided in the above mentioned decision. "

A Protocol embodying the optional clause concerning the compulsory jurisdiction of the Court was also opened. Up to date, the general protocol has been signed by 43 members of the League and the optional clause by 13 members; 23 ratifications have been deposited and 6 more are on their way to Geneva.

The coming into force of the Statute of the Court.

The third paragraph of the Assembly Resolution of December 13th stipulated that the Statute shall come into force and the Court be called upon to sit in conformity with the said Statute as soon as the Protocol of Signature has been ratified by a majority of the Members of the League.

This stipulation found its explanation in the fact that during the Assembly two theses were put forward concerning the manner in which the Court Statute could be adopted. First, that a vote by the Assembly would be sufficient; second, that an international convention was required. The result was a compromise, according to which there should be a vote by the Assembly and ratification by a majority of the Members of the League.

This stipulation was so construed as to make it necessary that 25 ratifications (the League has 48 Members) should be notified to the Secretariat, in order to enable the Secretariat to take all the necessary steps for the nomination of candidates.

In case these steps were not taken in time — about four months before the Assembly — the whole question of the election of judges might have become doubtful, though, as a matter of fact, the possibility had been seriously considered of having elections held — maybe provisional — in expectation of a sufficient number of ratifications being obtained.

Fortunately, it was not necessary to use that expedient.

Ratifications were, it is true, coming in very slowly, and by February, 1921, it was not difficult to foretell that, by April 1st, a sufficient number would not have been received to enable the Secretary-General, under the prevailing interpretation of the Assembly

Resolution, to request the various national groups to nominate their respective candidates. This explains why the Council of the League decided to authorise the Secretary-General to make all arrangements for the elections under the terms of the Statute on or after April 1st, in spite of the fact that at that time a very small number of ratifications would presumably be to hand, only *one* having been obtained when the authorisation was given.

The Nomination of Candidates.

These measures have consisted, in the first place, of completing or constituting the various national groups called upon to proceed to the nomination of persons in a position to accept the duties of members of the Court. The groups in question are the members of the Permanent Court of Arbitration for all States that are signatories to the Hague Conventions for the pacific settlement of international disputes. With regard to the other States, the groups consist of four persons appointed by their Governments on the same conditions as if they were to be members of the said Court. The next step was the invitation to the members of the respective groups to proceed, by groups, to the nomination of candidates. The candidates to be proposed by each group were not to exceed four, not more than two of them to be of the nationality of the nominating group. The members of the groups were reminded of the fact that those nominated should be chosen from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are of recognised competence in international law. Their attention was further drawn to the fact that the nominees ought to know French and English and that a member of the Court could not exercise any political or administrative function, or act as agent, counsel or advocate in any case of an international nature. They were finally recommended to consult, before making the nominations, the highest Court of Justice, the Legal Faculties and Schools of Law and the International Academies and national sections of International Academies devoted to the study of law in their own country.

The names thus proposed were formed into an alphabetical list, from which the Council and the Assembly will make their choice. This choice must be made regardless of the nationality of the candidates, but in consideration of the necessity that all the members of the Court should not only possess the qualifications required, but that the whole body should represent the main forms of civilisation and the principal legal systems of the world.

The Court will be composed of eleven judges and four deputy-judges, all of whom must fulfil the conditions just summarised. It can therefore be said that every precaution has been taken in order to secure the best men as judges. It should be mentioned in this connection that the salaries of the judges, though not exorbitant, are so fixed as to make it possible for persons of high standing to accept office.

The Election.

The machinery of the election is somewhat complicated. The Council and Assembly vote separately, and only such persons are elected as obtain an absolute majority within the two bodies. Voting may take place at least three times in order to fill as many of the seats as possible. If, after the third election, seats still remain vacant, provisions are made for avoiding a deadlock, a joint committee shall be formed, consisting of three members of the Assembly and three of the Council. This Committee shall propose to the Assembly and to the Council one name for each of the seats still vacant. If the Conference is unanimous,

it may present persons who do not appear on the official list of candidates. It is conceivable that even this method will fail if the Council and the Assembly cannot come to an agreement on the names submitted by the Committee. In such case, the Court is completed by cooptation.

It should be noted that in order to respond to an increasing burden of work and perhaps also to an increased membership of the League, the number of judges may be increased by the Assembly, upon the proposal of the Council, to 15 judges and 6 deputy-judges.

The term of mandate is nine years, with the right of re-election. By-elections are made only for the remainder of the term of office of the judges whose places are to be filled. The system of overlapping mandates has thus been abandoned, and it has been left to the operation of the right of re-election to ensure the necessary continuity in the work of the Court and in its jurisprudence.

The Court in Session.

As a rule, the full Court will sit. The number of 11 judges can, if necessary, be made up by calling upon deputy-judges. If it is impossible to get together 11 judges of any kind, the Court may sit with 9 judges.

There are some exceptions to this rule. First of all, there is to be a special chamber of 3 judges, appointed yearly, to serve as a section for summary procedure; it will be competent at the request of the parties. Secondly, there is to be one special chamber for labour questions, composed of 5 judges. This chamber, which will be appointed for three years in order to secure continuity of jurisprudence, will also be competent only at the request of the parties. The same rules apply to the special chamber that is to be appointed for the purpose of hearing and determining disputes concerning communications, transit, etc. When the *full* Court is considering labour, communications, and transit questions—that is to say, in the absence of any demand to the contrary from the parties—technical assessors will be added to the Court. In the case of labour questions, this is obligatory. With regard to the other categories, the assessors will be called upon only if the parties so desire, or by virtue of a decision of the Court.

One further exception from the general rule that the Court sits with 11 ordinary judges may be mentioned. After long, laborious, and sometimes heated discussions, it was agreed that, no matter what are the claims of perfect justice, and no matter what are the principles applied in internal jurisdiction, the parties ought, to some extent, to be represented on the Court—this, however, less in the interests of the parties than in the interests of the Court itself.

As is well known, tribunals of arbitration are for the greater part composed of members selected by the parties themselves. In the case of the Permanent Court they will form a very small minority. While, in arbitral awards, the award was really given by the umpire (the assessors acting more or less as advocates of the parties) the " umpire " giving the decision will, in the case of the Permanent Court, consist of a nucleus of not less than 9 judges. Moreover, the rôle of the judges of the nationality of the parties will be here not so much to advocate the special viewpoints of their respective countries as to constitute a guarantee for the drafting of the award or decision in terms that may be as little hurtful to the national feelings of the parties as is possible. They will also constitute a guarantee in the eyes of public opinion that all the merits of the case have really been considered by the Court.

Accordingly, it has been stipulated that judges of the nationality of the contesting parties shall retain their seats on the Court, and that if one of the parties only be represented, the other party has a right to appoint a temporary judge of its own nationality; similarly, if the Court includes no judge of the nationality of the parties, both of them may appoint temporary judges of their own nationality. Such temporary judges shall, as far as possible,

fulfil the conditions required of ordinary judges and shall take part in the decisions on an equal footing with them. By virtue of this stipulation, the number of judges may obviously be increased to thirteen.

Article 14 of the Covenant stipulates that the Court shall have the right to give advisory opinions on questions submitted to it by the Council or by the Assembly. At one stage of the preparation of the Statute, it was thought that in certain cases such opinions should be given not by the full Court but by a Committee of the Court. It was indeed found desirable that the Court as such should not commit itself by an opinion on questions which it might later on have to decide judicially. This standpoint was, however, abandoned by the Assembly.

The seat of the Court is established at The Hague. The special chambers for Labour and Communications cases may sit elsewhere if they think fit.

The personnel of the Court will, in the first place, consist of a registrar, who will be the head of the secretariat and who corresponds to the Secretary-General of the existing Cour, of Arbitration. It has been stipulated that the two posts may be combined.

The Procedure.

The rules of procedure of the Court are drawn up by the Statute only in their main outlines. These outlines follow, as much as possible, the rules of procedure adopted in the Convention for the Pacific Settlement of International Disputes, that is to say, the rules according to which tribunals of arbitration have to function under the Hague Conventions. It is, however, expressly stipulated that the Court shall frame its own rules; it has, consequently been left to the Court to fill up any gaps that may exist in the provisions laid down in the Statute. Some special features of the procedure as laid down there should be mentioned here.

A most important provision is the one according to which the Court shall meet every year on June 15th, and otherwise, when summoned by the President. These regular sessions constitute a great step forward in comparison with the Court of Arbitration. From June 15th every year there will be a Court sitting ready to deal with any cases that have been brought before it, or that are being brought before it, during the session.

Another important rule is that both French and English shall be the official languages of the Court. This provision may be criticised from the point of view of the unity of jurisdiction and from the point of view of expediency. But it is largely warranted by other considerations, among them being the fact that these two languages are the official languages of the League of Nations.

The third point to be underlined is that the Court will have the power to indicate any provisional measures which ought to be taken to preserve the rights of either party. Even in the new Court processes may be protracted, and in many cases it is in the power of one party to create a situation of facts which might strip the judgment, once it is given, of all its value. The provision in question is calculated to abolish this possibility.

Publicity.

Another interesting feature concerns publicity. Publicity is indeed to be the general rule, and the hearings will be secret only when the Court so decides, or if the parties demand that the public be not admitted. It is to be presumed that in the interests of public opinion the right to close the doors will rarely bemade use of. It is certainly in the interests not only of the Court but also of the parties to avoid any public suspicion.

The Judgment.

The Permanent Court of International Justice will, for the first time in the history of international jurisdiction, be able to give judgments by default, that is to say, to pronounce even in the case of one of the parties not appearing. This alternative will probably arise only in cases where the Court has compulsory jurisdiction. If, in a dispute of this kind, the defendant does not appear, the claimant may ask the Court to pronounce in his favour, and the Court may do so provided it finds the claim justified both in fact and law.

Formerly, it was considered as an essential feature of international judgments that they should be covered by the entire authority of the Court, no announcement being made as to whether the decision was unanimous or the result of a majority vote. The rules of procedure of the Permanent Court reverse this principle by stipulating that divergent views may be made public, with the reasons. It was thought that the public should be informed of the different opinions that might be, and had been, held on the subject, and, moreover, that judges who held a view differing from that of the majority should not have to be considered as sharing this view. They should have a free hand in future and, above all, they should be able, by delivering separate opinions, to state the standpoint of the legal systems which they represent with regard to the pending question. It was also considered as being in the interests of the creation of sound jurisprudence that the development should not be tied by judgments delivered in a certain direction when a large majority held an opposite view.

Jurisprudence.

The Statute also, in other respects, is careful not to restrict the development of jurisprudence within too narrow limits. For this reason, it stipulates that the decision of the Court shall have no binding force except as between the parties and in the special case. Consequently, an earlier judgment cannot be invoked as a decisive factor when the question later arises of settling a conflict of a similar description. Earlier judgments will have only an indicative, not a decisive value, and a jurisprudence will be formed only by the production of identical, or similar independent judgments on similar questions.

Third States may intervene as parties when they consider that they have a legal interest in the matter and when the Court concurs in this view. In this case, the decision is binding also on the parties who intervene. There is a special kind of intervention provided for in the Statute—namely, the one where it is a question of the interpretation of an international convention. In such cases, the interpretation is binding on all the signatories that have been duly notified of the process and that have made use of the right to intervene.

On principle, the judgments of the Permanent Court are final. Revision can, however, be asked for when a new fact is discovered that would have been of capital importance for the decision. In order to avoid creating a state of uncertainty, such a fact cannot be invoked unless discovered within ten years from the date of the first judgment, and a revision cannot be demanded after the expiration of a period of six months from the date of the discovery of the fact. The successful State can consequently, after $10^1/_2$ years, be certain that the conditions created by the Court are definite, and, if an important fact is discovered within this period but not made use of by the other party within six months, that this party does not want to create difficulties.

Rules of law to be applied.

From the formal rules — the rules of procedure — we may now turn to the material rules — the rules of law — upon which the Court shall base its judgments. Arbitrational procedure leaves the decision as to the choice of those rules exclusively to the parties, and if the parties do not give any indications to the competent tribunal, to the tribunal itself. As

is well known, Great Britain and the United States in the Alabama case agreed on a body of rules to be applied by the Court of Arbitration that sat at Geneva. In other cases, for instance the case concerning the Newfoundland Fisheries, the Courts have themselves worked out certain principles as bases for their judgments. In the majority of cases, however, it has been more or less a question of the interpretation of existing treaties or conventions.

The Statute of the Permanent Court once and for all lays down that the Court shall apply international conventions in so far as they can be considered as establishing rules expressly recognised by the litigant States. Side by side with such conventional law, international custom and the general principles of law recognised by civilised nations will be made use of — that is to say, general international law in force. It is for the Court itself to make out what is international law, and it is in this domain that the jurisprudence of the Court will have its greatest importance as a means of codifying the law of nations. It is expressly stipulated that judicial decisions and the teachings of the most highly qualified publicists of the various nations may be taken into account, but as has already been said, in the case of precedents, only as indicative and not as decisive factors.

Attention should be drawn to the fact, already mentioned, that the Advisory Committee of Jurists that sat at. The Hague recommended the convocation of Conferences of International Law mainly because it was considered that it would be extremely useful, not to say necessary, for the Court to be able to avail itself of a body of written rules. The Assembly's decision to discard this recommendation largely increases the importance of the rôle of the Court in creating International Law by its jurisprudence.

To the Article concerning the material rules to be applied, the Assembly added the right for the Court to decide a case *ex aequo et bono*, if the parties thereto agreed. Of course, this stipulation will have to be interpreted according to its wording, and this wording certainly gives the Court the power to act as an arbitrator, should the parties so decide. The stipulation is therefore the confirmation of the *prima facie* opinion on the character of the new Court which, as has been explained in an introductory way, was conveyed to any student of Article 14 of the Covenant and of its precedents — namely, the opinion that the Court should be a judicial institution with the right to act as an arbitrator.

However, if one may look behind the actual wording and to the intentions of the framers of the stipulations, it should be noted that those intentions certainly were to enable the Court to render what, in French law, is called "jugements d'accord," that is to say, to confirm by a judgment an agreement reached between the parties.

Who may be parties to proceedings before the Court?

Who are the parties between whom the Court will be competent to decide?

Before answering this question, let us do away with the alternative of the Court giving advisory opinions. In this case, according to the wording of the Covenant, the Court will have the duty — and consequently, in all probability, the right — to give opinions at the request of the Council or the Assembly only. Proposals to extend to Governments and, for instance to the Labour Office, the right to ask for such opinions were discarded by the Assembly. It was thought that everybody wanting an opinion could, without inconvenience, have recourse to the intermediary of the Council or the Assembly.

Now to the principal point: In this connection, the Statute contains the formal rule that only States and Members of the League can be parties to cases before the Court. The explicit mention made of the Members of the League is explained by the wish not to exclude the British Dominions and self-governing Colonies from the right to be parties. Attention should, however, be drawn to the fact that, although according to the wording of the Statute the Court would be competent to deal with disputes between two or more Dominions, or, say, between a Dominion and the Empire, such a contingency is hardly conceivable, for reasons

of constitutional law. In one case — as concerns the Conventions adopted by the Barcelona Conference — the representative of Great Britain made an express reservation in this sense.

But the Court is not available to all States alike. Only Members of the League or States mentioned in the annex to the Covenant can appear before it by full right. In the case of other States, the Council of the League can fix special conditions. Such conditions will presumably be of a financial nature; since the costs of the Court are borne by the League, it appears, indeed, to be just that States outside the League should contribute to those costs when availing themselves of the Court. In no case can the conditions put by the Council be such as to create for the State admitted on certain conditions a position of disadvantage in the procedure in comparison with his opponent, if the latter is a Member of the League.

The question has been raised whether the principal organs of the League—above all, the Council—should not be able, as such, to be a party to a dispute before the Court. This idea has, however, been discarded both by the Council at its Brussels meeting and by the Assembly. On the other hand, it is understood, as is expressly stated in the report on the Statute approved by the Assembly, that groups of States may appear as a party. Consequently, there is nothing to prevent the individual States represented at a given moment on the Council from instituting an action collectively, but not as the Council of the League. This possibility may prove to be of special value when it comes to enforcing certain stipulations of the treaties concerning the protection of racial, religious, etc. minorities.

What matters are within the Jurisdiction of the Court?

So much for the personal competence of the Court. As concerns its material jurisdiction, some indications have already been given when dealing with the amendments to the earlier schemes adopted by the Assembly. A repetition may perhaps be defensible, however, considering the importance of the question.

The system is as follows: The jurisdiction of the Court, in the first place, comprises all cases which parties there to submit to it; that is to say, all cases concerning which the parties conclude a special agreement to the effect that the pending conflict shall be decided by the Court. The Court is then made cognisant of the affair by being notified of the agreement by either party. The agreement in question is, of course, nothing else than the so-called *compromis*, well known in the domain of arbitral justice. There are, however, some considerable differences. First of all, the parties have to accept the Court as it is composed. Second, they have to accept the procedure as laid down in the Statute of the Court and in the rules adopted by the Court itself. And third, they have to adopt the material law laid down for the Court, with the sole exception that, if the parties agree, the Court can act as an arbitrator — decide the case *ex aequo et bono*. An attempt had already been made to explain this point.

Second, the Court has jurisdiction in all matters specially provided for in treaties and conventions in force. It should be specially noted that when a treaty or convention in force provides for the reference of the matter to a tribunal, to be instituted by the League of Nations, the Court will be such tribunal. The intention of these provisions is that when an international agreement says that the Permanent Court of International Justice or the jurisdiction instituted by the League of Nations shall decide disputes that may arise on the subject matters dealt with in the agreement, any party to the agreement may be able to bring such dispute before the Court for decision without obtaining the previous specific consent of the other party. In other words, in these cases, the jurisdiction of the Court is really compulsory. There is, however, one proviso implied, although it is not expressly stated. This proviso is that when the competence of the Court to decide disputes of the description referred to is not given purely and simply in the Convention or treaty but in a way restricted by reserves concerning independence, honour, vital interests and so on, an agreement shall be required.

In such cases the agreement, however, need contain only the statement that no such circumstances exist as would, according to the terms of the treaty or convention, prevent the compulsory jurisdiction of the Court. But, in those cases, the Court will be made cognisant of the affair, not by the unilateral demand of one of the parties as in ordinary cases of compulsory jurisdiction, but by the notification of the agreement.

As the existence of the Permanent Court of International Justice, even as a prospect, is of very recent date, only a relatively small number of conventions or treaties provide for the competence of this Court. The most important of those treaties are the peace treaties, and the most important parts of those treaties conferring compulsory jurisdiction on the Court are the parts concerning labour conditions and communications and transit. Older treaties of arbitration, however wide may be their terms, cannot, without a special agreement, be considered as conferring jurisdiction on the new Court. It is, however, conceivable that a general convention could be concluded to the effect that where treaties of arbitration provide that disputes shall be resolved judicially, the competent jurisdiction shall be the Court of Justice. But it is very much to be doubted that many States would be willing to put their names to such an agreement.

Finally, it should, be mentioned that the right to decide whether in a special case the Court has jurisdiction or not, according to the agreement between the parties or the treaties or conventions invoked, belongs to the Court itself.

As already explained, there was, at the First Assembly, a very widespread desire to confer upon the Court compulsory jurisdiction in a much larger measure. The Committee of Jurists that sat at The Hague had proposed to give such jurisdiction to the Court in practically all questions of a legal nature. The Council of the League did not consider that it had the powers required to propose to the Assembly such a far-reaching measure, and the Assembly eventually approved of the attitude of the Council. Or one might perhaps rather say, that the majority of the members of the Assembly were faced by the impossibility of obtaining a unanimous vote for a statute embodying the rule of compulsory jurisdiction, and that in view of this fact they gave up a struggle that would have been fruitless.

The Optional Clause for Compulsory Jurisdiction.

After long discussions, they eventually obtained partial satisfaction by means of the optional clause. This clause enables such signatories to the protocol of signature concerning the Statute as want to bind themselves to the principle of compulsory jurisdiction to do so on condition of reciprocity, for a time that they may deem fit, and with regard to the same kind of disputes as are described in Article 13 of the Covenant as being generally suitable for "arbitration." Such disputes are legal disputes concerning the interpretation of a treaty; concerning any question of international law; concerning the existence of any fact which, if established, would constitute a breach of international obligation; and, finally, concerning the nature and extent of the reparation to be made for the breach of such an obligation.

These enumerations recall the methods proposed by Switzerland at the Second Peace Conference at The Hague for creating a substitute for the general treaty of arbitration which the Conference failed to establish. The enumeration covers also the whole field within which international disputes generally arise in so far as they are not of a more or less purely political character. A very important fact is that the signature of a power under the optional clause concerning compulsory jurisdiction is equivalent to the conclusion of a convention between this signatory and all the other signatories to the clause, creating a binding obligation to accept the compulsory jurisdiction of the Court within the limits of the wording of the clause and of the special conditions—concerning the period of validity and reciprocity—which may attach to the signatures Such States can consequently arraign one another

before the Permanent Court in disputes of a legal character, even in the absence of such a treaty or convention as is generally required in order to establish the compulsory jurisdiction of the Court.

Thus, the optional clause and the signatures thereto constitute a very serious beginning of the transplantation into the international domain of the principles on jurisdiction that have obtained for centuries within the several States.

The rôle of the new Court

The importance of the new Court for the development of international law and for the maintenance of peace rests, above all, upon its personal and material competence. The importance of the Court is great and should not be underrated. However it, would be dangerous to attribute to the Court an importance that could not belong to it. Upon exaggerated hopes or confidence would follow—as was the case with regard to the Permanent Court of Arbitration—the blackest scepticism. This scepticism would constitute a very great danger to the young institution and would jeopardise the blessings that the world is entitled to expect from its creation and activities.

It is necessary to point out that not only will arbitration in its old technical sense continue to play an important part in the solution of international disputes; but, in the gravest cases, at least in those upon which the attention of the world will chiefly be centred, the States will prefer to address themselves to arbitrators chosen by themselves and entrusted with the duty of conciliating the conflicting interests on the basis of legal considerations rather than have recourse to a tribunal constituted with a view to the application of strict principles of law. Any other view would bear witness only to a lack of comprehension of international relations such as they are at present: but, on the other hand, it would be quite erroneous to hold that for this reason the Permanent Court of International Justice should be looked upon as superfluous or unimportant.

First of all, there are numerous questions which the States prefer not to submit to the protracted and costly procedure of arbitration, but which they will probably hasten to bring before a Court where the expenses involved will not be out of proportion to the importance of the affair. Those are questions arising almost daily and which affect only to an insignificant degree the political action of the States—questions that at present are solved according to the wishes of the stronger. To bring disputes of this description under the scope of justice, to create a real jurisprudence in those domains, are missions of the new Court which would in themselves suffice to make of it an extremely important factor.

This is not, however, the only point of view, or even the principal one, from which the reasons for the creation of a Permanent Court of International Justice should be considered. Arbitration, although constituting a great step forward in the domain of international relations, has not been able to contribute appreciably to the development within the family of nations of the idea of justice and law. Arbitration has been, and must be, according to its very nature, rather a means for solving a certain conflict than an instrument for the realisation of justice. That is, at the same time, both the strength and the weakness of arbitration, strength, because it thus responds to claims inherent in the idea of inter-State relations; weakness, because for the same reason, it could not co-operate in an efficient way in establishing the reign of law in inter-State relations. But what arbitration has failed to do up to this date, and will probably always fail to do, it is for the Permanent Court of International Justice to realise. To create little by little, by practical and successive solutions, a conscience of justice within the community of nations, and to make that community love the conception of justice, to compel nations to feel and appreciate the invaluable blessings of law, that is what those who are equally far from sharing the thoughtless enthusiasm of some, and the unwarrantable scepticism of others, may confidently expect from this new institution.

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ATAR, GENEVA